Supreme Court

October Term, 1962

No. 908

Petitioner,

Respondent.

Counsel for Respondent.

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In the Supreme Court
OF THE
United States

October Term, 1961

No. 908

J. Leland Anderson,
Petitioner,

vs.

Roger I. Knox,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported at 297 F. 2d 702, and of the United States District Court for the District of Hawaii at 159 F. Supp. 795, and its Findings of Fact and Conclusions of Law at 162 F. Supp. 338.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does Petitioner's dismay at the unanimous decision of the Court of Appeals sustaining the judgment based upon the findings of fact of the District Court raise constitutional or federal questions?

2. Is not Petitioner's bad faith in filing the petition herein apparent on the face of the record?

STATEMENT

Petitioner, through fraud and misrepresentation, induced Respondent to purchase insurance policies as part of a bank financed plan. After trial without a jury, the trial court gave judgment to the Respondent supported by detailed findings of fact and conclusions of law.

On appeal, the judgment was affirmed on the basis that the findings of fact were fully sustained by the evidence.

On motion for rehearing, Petitioner alleged without record foundation that because the Court of Appeals had changed the legal basis of the judgment, there was a denial of "due process" and "by analogy to *ex post facto* constitutional provisions", there was a violation of Petitioner's rights. This petition for rehear-

ing purporting to raise federal and constitutional questions, cannot adequately be paraphrased.

REASONS FOR DENYING THE PETITION

I. THERE ARE NO FEDERAL QUESTIONS REQUIRING EXAMINATION BY THIS COURT.

Petitioner has introduced to this Court several alleged federal questions which were raised for the first time in Petitioner's Petition for Rehearing before the United States Court of Appeals for the Ninth Circuit, on or about February 12, 1962.

A factual and legal determination of the elements constituting fraud under the common law of the State of Hawaii does not involve a federal question. It is elementary that a plaintiff "may not drag in the federal question by its heels". 2 Moore, Federal Practice (1961 ed.) Par. 2.07 [2] and cases cited therein.

II. THERE ARE NO HAWAII OR FEDERAL CASES INVOLVING FRAUD AND DECEIT IN CONFLICT WITH THE COURT OF APPEALS' DECISION.

This case (to quote the language of the United States Court of Appeals for the Ninth Circuit in its Order upon Motion for a Further Stay of Mandate) "is an exceedingly simple one. Aside from a minor question relating to the measure of damages recoverable under Hawaii law (the sole question is whether the evidence in the court below was sufficient to sustain the trial court's finding of fraud and deceit".

Petitioner does not cite any fraud and deceit cases at variance with the decision of the Court of Appeals or the District Court. The cases cited do not indicate that the factual findings and legal conclusions of the Court of Appeals are in conflict with any Hawaii or Federal cases.

Under Rule 52(a) of the Federal Rules of Civil Procedure, an appellate court will not set aside the findings of fact unless clearly erroneous. The Petition reiterates a discontentment with the findings of fact that the Petitioner was the perpetrator of a fraud upon the Respondent. The granting of the petition for writ of certiorari is inconsistent with the conclusiveness of the trial court's findings of fact based upon substantial evidence as disclosed by the record. *U. S. v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950); *Young Ah Chor v. Dulles*, 270 F. 2d 338, C.A. Hawaii (1959); *National Lead Co. v. Western Lead Products Co.*, 291 F. 2d 447, C.A. Cal. (1961); *Cordoran Associates, Inc. v. Dayton Rubber Co.*, 290 F. 2d 858, C.A. Ohio (1961).

III. THE RECORD IS SILENT ON THE PUBLIC IMPORTANCE AND IMPACT OF THIS CASE UPON THE INSURANCE INDUSTRY AND THE ASSERTIONS REQUIRING A CLASS ACTION.

Petitioner labels this effort in the nature of a class action by stating that he is representing 225,000 to 300,000 fellow insurance agents. There is no basis in the record for this implication, or for any assertion

that the standard of actionable behavior of vendors of insurance has been affected by this decision. (See last paragraph of Concurring opinion of Circuit Judge Chambers in Circuit Court of Appeals opinion.)

IV. THE COURT OF APPEALS' DECISION AFFIRMS THE DISTRICT COURT'S FINDINGS OF FRAUD AND DECEIT.

Petitioner alleges that he has been surprised by the Court of Appeals' departure from the grounds of the decision of the District Court. The findings of fact in the District Court's opinion, 162 F. Supp. 388, are based on a common law action of fraud and deceit and not, as petitioner alleges, a violation of a fiduciary duty.

V. FILING OF PETITION FOR WRIT OF CERTIORARI IS FRIVOLOUS AND VEXATIOUS.

Respondent seeks just damages for the delay caused by the filing of the petition for writ of certiorari and such costs incurred thereof in accordance with Supreme Court Rule 56(4).

The Order upon Motion for Further Stay of Mandate by the United States Court of Appeals for the Ninth Circuit, dated March 31, 1962, states after referring to the actions of the Petitioner with respect to making his property unavailable to the judgment creditor, in part on pages 6 and 7 as follows: "We are obligated to find and do find that the application for the further stay of mandate is not made in good faith."

Authority for this Court to assess damages for the frivolous and vexatious delay caused by the Petitioner is found in *Roe v. Kansas ex rel. Smith*, 278 U.S. 188, (1929); *Deming v. Carlisle Packing Co.*, 226 U.S. 102, (1912); *Amory v. Amory*, 91 U.S. 356, (1876); *Louie v. Willacy*, 239 F. 2d 179, C.A. 9th (1956); *In re Midland United Co.*, 141 F. 2d 692, C.A. 3d (1944); *Occidental Life Ins. Co. v. Eiler*, 125 F. 2d 229, C.A. 8th (1942); *MacDonald v. Winfield Corp.*, 104 F. Supp. 609, D.C. E.D. Pa. (1952).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied. The Respondent further prays this Court adjudge to this Respondent his damages pursuant to Rule 56(4) of the Rules of this Court for the Respondent's delay.

Dated, Honolulu, Hawaii,
May 21, 1962.

Respectfully submitted,

J. RUSSELL CADES,
Counsel for Respondent.